IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-247

JACK SIMMONS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON REHEARING OF PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DENIAL OF CERTIORARI

This Court denied certiorari on December 9, 1974.

JURISDICTION

The jurisdiction of this Court to rehear the Petition for a Writ of Certiorari is Supreme Court Rule 58(2).

GROUNDS FOR REHEARING

Following are substantial grounds available to Petitioner although not previously presented, to wit:

1. Justices Brennan, Stewart and Douglas, have held that where the defendant presents a reason for vacating his guilty plea and the Government has not relied on the plea to its disadvantage, the guilty plea may be vacated and the right to trial regained, where the Motion to Vacate is made prior to sentence.

2. In this case, the Government offered no evidence that it had relied on the guilty plea to its disadvantage. (Transcript of April 16, 1973, hearing on Petitioner's Motion to Withdraw Guilty Plea, page 91.)

3. District Court improperly considered the statement of Assistant United States Attorney Peter L. Dearing, during argument and after all the witnesses had testified and after the Government stated it had no other witnesses, to state as evidence that the Government would not be able to locate its witnesses. (Transcript of April 16, 1973 hearing, pages 136-138.)

4. An Assistant United States Attorney should not be permitted in a hearing on a Motion to Withdraw a Guilty Plea to examine and cross-examine witnesses, and then after the evidence has been completed, while he is arguing the case for the Government, to be able to give evidence opposing the Motion to Withdraw Guilty Plea.

5. Petitioner should have been permitted to substitute a plea of not guilty and have a trial as he had reasons for the granting of the privilege of a jury trial that were fair and just, to wit:

a. That he was not guilty of the offenses charged against him;

b. That his co-counsel had advised him to plead guilty and he would receive probation, as the Government had agreed to abstain from a sentence recommendation. (Transcript of April 16, 1973 hearing, pages 9, 11, 12, 31, 32, 39, 40, 41, and 42.)

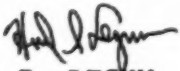
6. Criminal Rule 32(d) was not construed by the Fifth Circuit in accordance with the holdings of Kercheval v. United States, 274 U.S. 220, 224, 71 L.Ed. 1009, 47 S.Ct. 582 (1927); Santo Bello v. New York, 404 U.S. 257, 267, 30 L.Ed. 2d 427, 92 S.Ct. 495 (1971); Dukes v. Warden, 406 U.S. 250, 32 L.Ed. 2d 45, 52, 92 S.Ct. 1551 (1972); Nagelberg v. United States, 377 U.S. 266, 12 L.Ed. 2d 290, 84 S.Ct. 1252 (1964).

7. The District Judge, at the hearing on the motion to vacate the guilty plea, remarked that no one knows whether witnesses can be found unless you try to find them, indicating that the Assistant United States Attorney's statement that the witnesses could not be found if the guilty plea was withdrawn, was speculative. (Transcript of April 16, 1973, pages 148, 147).

CONCLUSION

For the foregoing substantial grounds, the Petition for a Writ of Certiorari should be granted.

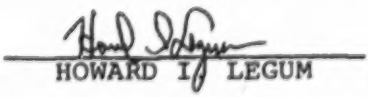
Respectfully submitted,



HOWARD I. LEGUM
LOUIS B. FINE

December 1974

I, Howard I. Legum, a member of the Bar of the Supreme Court of the United States, do certify that this Petition for Rehearing is presented in good faith and not to delay and is restricted to the grounds above specified.



HOWARD I. LEGUM

Fine, Fine, Legum and Fine
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